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April 14, 2008

By Overnight Delivery

Hon. Denise L. Cote
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Suite 1040
New York, New York 10007

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 4/16/08

MEMO ENDORSED

Re: *Wilner, et al. v. National Security Agency, et al.*, 07-cv-3883-DLC

Dear Judge Cote:

This Office represents the Defendants in the above-referenced action, which concerns Plaintiffs efforts to obtain documents and other information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552b, relating to the Terrorist Surveillance Program ("TSP"). I write to request a modification, as set forth below, of the current briefing schedule. Plaintiffs consent to the requested extension.

As the Court is aware, there have been two unopposed modifications to the briefing schedule, one by Defendants and one by Plaintiffs. First, in February 2008, Defendants sought, and the Court endorsed, an initial modification of the briefing schedule to bifurcate briefing on Plaintiffs' FOIA claim into a (i) "Glomar" track, related to the Defendants' determinations that they could neither confirm nor deny whether any Plaintiff had been the target of surveillance under the TSP, and (ii) non-"Glomar" track, related to the Defendants' determinations to withhold documents responsive to Plaintiffs' other request as identified in their Complaint. *See* Docket Entry 14 (Endorsed Letter). As per that schedule, the Defendants timely filed for partial summary judgment on the Glomar track on February 22, 2008, and timely provided to Plaintiffs by letter on March 28, 2008, draft indices in support of the non-Glomar track. Second, Plaintiffs sought additional time to respond to the Defendants' motion for partial for summary judgment, which the Court granted. *See* Docket Entry 20 (Endorsed Letter).

Under the existing schedule, Defendants are next to file for partial summary judgment on the non-Glomar document track on April 18, 2008. Defendants now seek an extension of that deadline until May 30, 2008. The parties also seek a corresponding shift in status conference, which is currently set for April 25, 2008, to the week of June 2, 2008, as the Court's and Plaintiffs' schedule permits. The Defendants request this relief for several reasons.

First, while the processing of the FOIA request has largely been completed, there are a small number of referrals from the Office of Legal Counsel that are outstanding and must be completed. Second, while some discussions between the parties on possible narrowing of documents at issue in the non-Glomar track has occurred, those discussions have not yet produced a significant narrowing of the issues. Given the large number of component agencies at issue, at present a number of separate declarations and/or indices will need to be prepared in a manner that presents the documents at issue in the most comprehensible way possible. The parties' discussions are ongoing, however, and some additional agreement may be possible and it would be in the interest of the parties and the Court to focus only on those documents that will be at issue rather than other issues. Third, undersigned counsel along with other Government counsel has been preparing a reply brief in the *Al-Haramain* litigation in multidistrict proceedings before Judge Walker that is due April 14, 2008, is scheduled to attend oral argument in *Al-Haramain* on those issues in San Francisco during the week of April 21, 2008, and has an oral argument set later this month in Massachusetts.¹ Finally, Ms. Bhattacharyya, who has handled all of the Defendants' FOIA litigation related to the TSP was temporarily detailed from the Civil Division, is scheduled to return to the Civil Division on May 26, 2008.

If the Court agrees, the parties jointly propose the following modification to the non-Glomar schedule:

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|-----------------------------|--|
| May 30, 2008 | Government to file its motion for summary judgment on document (non-"Glomar") defense, along with any declarations and modified or supplemental indices upon which the Government will rely |
| Week of June 2, 2008 | A status conference to permit the parties to (i) discuss with the Court any outstanding issues related to the motion for summary judgment on document defense, including any issues raised by Plaintiffs as to the adequacy of the information submitted by the Government in support of its motion for summary judgment; and (ii) set the remaining schedule on the Government's motion, including if necessary, briefing on issues related to the adequacy of the information submitted by the Government. |

Thank you for your consideration of this request.

The Government's summary judgment motion on the non-Glomar defense is due April 28, 2008. The conference is adjourned to May 8 at 3:00 pm. Denise Cote April 14, 2008
cc: Counsel for Plaintiffs (by electronic delivery)

Respectfully,

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¹ Undersigned counsel also has preexisting personal travel set in mid-May.